Supreme Court U.S.

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No. 01- 01 116 JUL 19 2001

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IN THE

Supreme Court of the United States

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Political subdivisions created and operated under Article XVI, Section 59 of the Texas Constitution — like the Petitioner, El Paso County Water Improvement District No. 1 — manage, conserve, and reclaim the natural resources of the State of Texas. Are these political subdivisions arms of the State for purposes of Eleventh Amendment immunity from suit in federal court?

2. When state law clearly characterizes a political subdivision — like the Petitioner, El Paso County Water Improvement District No. 1 — as an arm of the state, is it necessary to apply a multi-factor test before holding the political subdivision immune from suit in federal court under the Eleventh Amendment immunity?

3. When a federal court has held that a political subdivision is an arm of the state entitled to Eleventh Amendment immunity — like the Petitioner, El Paso County Water Improvement District No. 1 — is it necessary in a subsequent suit to re-examine whether such political subdivision is immune from suit under the Eleventh Amendment?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, El Paso County Water Improvement District No. 1, is a political subdivision created under Article XVI, Section 59 of the Texas Constitution.

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OPINIONS BELOW

Copies of the following lower court opinions are reprinted in the Appendix to this Petition:

- *Southwestern Bell Tel. Co. v. City of El Paso*, 243 F.3d 936 (5th Cir. 2001) (App. A); and

- *Southwestern Bell Tel. Co. v. City of El Paso*, No. EP-98-CA-114-EP (W.D. Tex. May 17, 2000) (unpublished order) (App. B).

The following opinions directly conflict with the lower court opinions and are also reprinted in the Appendix to this Petition:

- *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, No. P-98-CA-27 (W.D. Tex. Nov. 13, 1998) (unpublished) (App. D); and

- *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d 208 (5th Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 177, 148 L. Ed. 2d 121 (2000) (App. E).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 19, 2001. The Fifth Circuit denied Petitioner's Petition for Rehearing En Banc on April 25, 2001 (App. C). Jurisdiction is authorized by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eleventh Amendment, which states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

This case also questions the applicability of Eleventh Amendment immunity to political subdivisions created under Article XVI, Section 59 of the Texas Constitution. Section 59(a) provides:

> The conservation and development of all natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties, and the Legislature shall pass all such laws as may be appropriate thereto.

TEX. CONST. art. XVI, § 59(a).

Section 59(b) of the Texas Constitution provides:

> There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

TEX. CONST. art. XVI, § 59(b).

STATEMENT OF THE CASE

The Respondent, Southwestern Bell Telephone Company ("Southwestern Bell"), originally brought this suit for injunctive and declaratory relief against the City of El Paso, alleging that a city ordinance violated state utility and federal telecommunication laws. R.80-93. Southwestern Bell eventually settled its claims with the City of El Paso, which is not a party to this appeal.

Southwestern Bell also sued the Petitioner, the El Paso County Water Improvement District No. 1 ("the District"), a political subdivision of the State of Texas, under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. §§ 2201-02, § 1343 (Declaratory Judgment Act). R.76. According to Southwestern Bell, the District violated 47 U.S.C. § 253a (the Federal Telecommunications Act) by assessing a fee for applications to cross or use the District's rights-of-way. R.76, 99.

On December 1, 1999, the District moved to dismiss Southwestern Bell's claims based on Eleventh Amendment immunity, urging the district court to apply *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, No. P-98-CA-27 (W.D. Tex. Nov. 13, 1998) (unpublished), which holds that the District is immune from suit in federal court as an arm of the State of Texas. R.536-41, 641. On April 10, 2000, the Fifth Circuit affirmed the *Ysleta* order of dismissal in an initially unpublished opinion. *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d 208 (5th Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 177, 148 L. Ed. 2d 121 (2000).

Nonetheless, the district court in this case rejected *Ysleta* and, on May 17, 2000, denied the District's motion to dismiss based on Eleventh Amendment immunity. R.2032-41. On June 9, 2000, the District timely appealed based on the collateral order doctrine. R.2052; *see also* FED. R. APP. P. 4(a)(1)(A); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147, 113 S. Ct. 684, 689, 121 L. Ed. 2d 605 (1993). On August 9, 2000, the Fifth Circuit ordered that its opinion in *Ysleta* be published.

Despite this controlling authority, on March 19, 2001, another panel of the Fifth Circuit issued a published opinion affirming the district court's order in this case and finding the District was ***not*** protected by Eleventh Amendment immunity. On April 25, 2001, the Fifth Circuit denied the District's petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Panel's Misunderstanding of the Eleventh Amendment Immunity Test Destroys *Stare Decisis* and Threatens the Power of States to Shield Their Instrumentalities from Suit in Federal Court.

The Fifth Circuit panel that rendered the judgment in this case erred when it retracted the District's status as an arm of the State of Texas entitled to Eleventh Amendment immunity solely because the trial court and a different Fifth Circuit panel did not apply a multi-factor test. Where the nature of the political subdivision is clear from state law providing for its creation, there is no necessity or reason to apply a multi-factor test. And once the nature of the political subdivision is established under federal law, there is no need to apply and reapply the multi-factor test each time the political subdivision is named as a defendant in a federal lawsuit.

The District is an arm of the State of Texas as an agency created and operated under Article XVI, Section 59 of the Texas Constitution. *See Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 814 (Tex. 1993). Like hundreds of other political subdivisions created under the same constitutional provision, the District has enjoyed — and should continue to enjoy — Eleventh Amendment immunity from suit in federal court. Although the Fifth Circuit had consistently recognized Eleventh Amendment immunity for political subdivisions created under Article XVI, Section 59, the Fifth Circuit panel in this case diverted from its own precedent, creating a new and unanticipated direction in the law of Eleventh Amendment immunity.

Before the panel decision was rendered in this case, the Fifth Circuit routinely applied a multi-factor test, but only to determine whether political subdivisions formed under the laws of other states or under different provisions of Texas law possessed Eleventh Amendment immunity. *See, e.g., Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147 (5th Cir. 1991) (considering six factors to Louisiana political subdivision); *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 438-42 (5th Cir. 1985) (same); *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982) (applying factors to Texas political subdivision). Other circuits frequently apply a multi-factor test, although the number of factors is far from uniform. *See* Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1269-71 (1992) (noting the number of factors considered by the circuits ranges anywhere from two to nine).

In addition to applying its own multi-factor test, the Fifth Circuit acknowledged that when state law clearly classifies a political subdivision as an arm of the state, it is unnecessary to consider the multi-factor test before applying Eleventh Amendment immunity to that political subdivision. *See, e.g., Kamani v. Port of Houston Auth.*, 702 F.2d 612, 613 (5th Cir. 1983). Likewise, the Fifth Circuit acknowledged that when a federal court examined a political subdivision's status and determined its right to Eleventh Amendment immunity, it was thereafter unnecessary to revisit the factors that initially supported application of the Eleventh Amendment. *See, e.g., Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104-05 (5th Cir. 1995).

The Fifth Circuit specifically declined to routinely apply the multi-factor test when discussing the Eleventh Amendment status of Article XVI, Section 59 political subdivisions like the District:

> Fortunately, the Fifth Circuit's apparent "bright-line" test established in *Pillsbury* makes it unnecessary for this Court to engage in either the *Delahoussaye/Jacintoport* or the *Hess* [*v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994)] analyses to determine whether EPCWID is an entity whose nexus with the state entitles it to assert sovereign immunity. . . . The Court will therefore apply the *Kamani/Guillory/Pillsbury* approach regarding entities created under Article XVI, section 59 of the Constitution of the State of Texas in this case. Thus, EPCWID is entitled to Eleventh Amendment immunity by virtue of how it was created and is operated.

See Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1, No. P-98-CA-27, slip op. at 10 (W.D. Tex. Nov. 13, 1998) (unpublished), *aff'd*, 222 F.3d 208 (5th Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 177, 148 L. Ed. 2d 121 (2000).

A bright-line test benefits judicial efficiency and provides fairness and predictability for political subdivisions that are created and operated under similar statutory or constitutional provisions. This result also satisfies this Court's observation that the most critical element of Eleventh Amendment immunity is a state's own characterization of its agency or political subdivision. *See Regents of the Univ.*

of Cal. v. Doe, 519 U.S. 425, 430 n.5, 117 S. Ct. 900, 903 n.5, 137 L. Ed. 2d 55 (1997).

The Texas constitutional provision — Article XVI, Section 59 — authorizes the creation of a variety of political subdivisions that perform only state governmental functions for the conservation and reclamation of the state's precious natural resources. *See generally Bennett v. Brown County Water Improvement Dist. No. 1*, 153 Tex. 599, 607, 272 S.W.2d 498, 502-03 (1954). Districts created under Article XVI, Section 59 "are all designed to effectuate the same objectives, that is, the conservation and utilization of the natural resources of the state in which ***all the public*** are interested." *Sears v. Colorado River Municipal Water Dist.*, 487 S.W.2d 810, 811 (Tex. Civ. App. – Eastland 1972, writ ref'd n.r.e.) (emphasis added); *see also* TEX. WATER CODE ANN. § 49.211(b) (Vernon 2000) (extending the District's authority beyond the boundaries of El Paso County). The Texas Supreme Court has stated that a conservation and reclamation district is "a State governmental agency." *Lower Neches Valley Auth. v. Mann*, 140 Tex. 294, 299-300, 167 S.W.2d 1011, 1014 (1943).

Relying on and reaffirming its decision in *Bennett*, the Texas Supreme Court held in *Guillory v. Port of Houston Authority*, 845 S.W.2d 812, 814 (Tex. 1993), that Article XVI, Section 59 political subdivisions are entirely governmental in function:

> In *Bennett* we held that governmental units created under Article XVI, Section 59 of the Texas Constitution are entirely governmental in function. Water improvement districts and other agencies created under this constitutional provision are

> different from municipalities in that the former are created by the legislature for general public purposes, while the latter are created by consent of their inhabitants.

More recently, in *Loyd v. Eco Resources, Inc.*, 956 S.W.2d 110, 122 n.4 (Tex. App. – Houston [14th Dist.] 1997, no writ), the court defined "governmental function" as "an activity that is carried out by an arm of the state for the purpose of serving the general public." The court also stated, "Water districts and like entities created under section 59 of article XVI of the Texas Constitution can ***only*** perform governmental functions." *Id.* at 122 (emphasis added). Thus, by performing governmental functions, water districts and other political subdivisions created under Article XVI, Section 59 are arms of the state. *See id.*

In discharging their governmental functions, Article XVI, Section 59 water districts, "as agents of the State, are essentially exercising the State's and their own police power, which has been defined as a 'grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort and the welfare of the public.' " *Banker v. Jefferson County Water Control & Improvement Dist. No. 1*, 277 S.W.2d 130, 133 (Tex. Civ. App. – Beaumont 1955, writ ref'd n.r.e.) (quoting *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513, 515 (1916)). This grant of authority and governmental function is particularly true regarding the history, formation, and nature of the District in this case:

> The plaintiff District was established in 1917 under the authority of a Texas Statute. Later it was converted into a conservation and reclamation district under the Constitution of Texas,

> [TEX. CONST. art. XVI, § 59], but without any change in name. Under the statute, it has a broad right of eminent domain and the authority hereby conferred shall authorize and empower such districts to condemn all lands, private and public, for the purpose herein indicated, beyond the boundary of such districts and in any county within the State of Texas, and it also has the power of taxation. In fact, such districts and various other similar districts are not classed with municipal corporations, but are held to be political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law.
>
> ***It is not only an arm of the State, but is fashioned to perform public service and duties of high importance in the welfare of the people of Texas.***

El Paso County Water Improvement Dist. No. 1 v. City of El Paso, 133 F. Supp. 894, 914 (W.D. Tex. 1955) (emphasis added), *reformed in part, aff'd in part*, 243 F.2d 927 (5th Cir.), *cert. denied*, 355 U.S. 820 (1957).

It seems beyond dispute, in light of Texas state law, that the District is an arm of the State of Texas immune from suit in federal court. *See Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.2d at 104 (holding that a political subdivision which is "a creature of state law and a political subdivision of the State of Texas" is "entitled to Eleventh Amendment immunity"). Furthermore, under federal precedent, the District is an arm of the State of Texas

immune from suit in federal court. *See Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d at 208; *Kamani v. Port of Houston Auth.*, 702 F.2d at 613.

Prior to this case, the Article XVI, Section 59 conservation and reclamation districts had enjoyed Eleventh Amendment immunity from suit in federal court consistent with this Court's opinion in *Regents of the University of California v. Doe*, 519 U.S. at 430 n.5, 117 S. Ct. at 903 n.5. *See, e.g., Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d at 104 (recognizing the unique status of political subdivisions created under Article XVI, Section 59 of the Texas Constitution); *Kamani v. Port of Houston Auth.*, 702 F.2d at 613 (characterizing a port authority as "a creature of state law" entitled to immunity from suit under the Eleventh Amendment); *McCrea v. Harris County Houston Ship Channel Navigation Dist.*, 423 F.2d 605, 607 (5th Cir. 1970) (defining a navigation district created under Article XVI, Section 59 to be "a creature of state law"). The District has enjoyed Eleventh Amendment immunity as an Article XVI, Section 59 political subdivision. *See, e.g., Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d at 208.

In this case, however, a panel of the Fifth Circuit erroneously concluded that the multi-factor test must be applied in every instance where a defendant asserts Eleventh Amendment immunity from suit in federal court. This conclusion is a radical departure from Fifth Circuit precedent, and it ignores state law recognizing that Article XVI, Section 59 political subdivisions are arms of the state of Texas. More particularly, the Fifth Circuit's opinion erroneously retracts the District's previously existent Eleventh Amendment immunity.

Significantly, this Court has cautioned that the determination of Eleventh Amendment immunity is a question of federal law, "[b]ut that federal question can be answered only after considering the provisions of state law that define the agency's character." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. at 430 n.5, 117 S. Ct. at 903 n.5; *see also Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982) ("A federal court must examine the particular entity in question and its ***powers and characteristics as created by state law*** to determine whether the suit is in reality a suit against the state itself."). It is pointless to require the repeated application of a multi-factor test each time a particular political subdivision claims Eleventh Amendment immunity, particularly when the Fifth Circuit has determined the nature of the political subdivision. It is also pointless to apply the multi-factor test when the state constitution clearly defines the character of the political subdivision at issue. The decisions of this Court do not require the inconsistent, unpredictable results generated by the Fifth Circuit's new approach to Eleventh Amendment immunity.

II. The Federal Issue Is Important: Hundreds of Political Subdivisions Throughout Texas Will Improperly Be Denied Eleventh Amendment Immunity.

The constitutional subdivisions created under Article XVI, Section 59 are state agencies that have long-relied on the Texas Supreme Court and the Fifth Circuit to define the scope of their duties and immunities. *See, e.g., Lower Neches Valley Auth. v. Mann*, 140 Tex. at 299-300, 167 S.W.2d at 1014; *Kamani v. Port of Houston Auth.*, 702 F.2d at 613; *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. at 914. Any unpredictable course in

the development of Eleventh Amendment law affects not only the District, but also countless governmental subdivisions created under Article XVI, Section 59 of the Texas Constitution. *See, e.g.*, TEX. AGRIC. CODE ANN. § 78.011(a) (Vernon 1995) (noxious weed control district); *id.* § 202.003 (Vernon 1982) (wind erosion district); TEX. HEALTH & SAFETY CODE ANN. § 402.011(a) (Vernon 1992) (radioactive waste disposal authority); TEX. WATER CODE ANN. § 36.011(a) (Vernon 2000) (groundwater conservation district); *id.* § 51.011 (Vernon 2000) (water control and improvement district); *id.* § 53.088 (Vernon Supp. 2001) (fresh water supply district); *id.* § 55.021 (Vernon 1972) (water improvement district); *id.* § 56.011 (Vernon 1972) (drainage district); *id.* § 57.011 (Vernon 1988) (levee improvement district); *id.* § 58.011 (Vernon 1988) (irrigation district); *id.* § 62.021 (Vernon 1988) (navigation district); *id.* § 64.001 (Vernon 1988) (water import authority); *id.* § 66.011 (Vernon 1988) (storm water control district).

The Fifth Circuit's opinion in this case, which requires application of the multi-factor test even in instances where the Texas Constitution clearly describes the character of the political subdivision at issue, is contrary to this Court's direction and has produced an absurd result: In one case, the District is protected by Eleventh Amendment immunity; but, in another case, it is denied the same protection. In future lawsuits, will another Fifth Circuit panel make yet another determination of the District's Eleventh Amendment immunity? Given the large number of Article XVI, Section 59 subdivisions and the constant threat of suit in federal courts, the question presented by this Petition is critical to the law of Eleventh Amendment immunity, not merely in Texas.

III. The District Qualifies for Eleventh Amendment Immunity Even If the Multi-Factor Test is Applied.

A political subdivision created under Article XVI, Section 59 is entitled to Eleventh Amendment immunity because the Texas Constitution establishes such political subdivisions as arms of the State of Texas with statewide, governmental duties. Nevertheless, even if the Court were to strictly apply the multi-factor test, the District would qualify for Eleventh Amendment immunity. Whether a particular state agency is an arm of the state entitled to Eleventh Amendment is a question of federal law "answered only after considering the provisions of state law that define the agency's character." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. at 430 n.5, 117 S. Ct. at 903 n.5. Under Texas state law, the District is essentially a state agency. *See Guillory v. Port of Houston Auth.*, 845 S.W.2d at 814; *Bennett v. Brown*, 272 S.W.2d at 503; *Lower Neches Valley Auth. v. Mann*, 167 S.W.2d at 1014; *Sears v. Colorado River Municipal Water Dist.*, 487 S.W.2d at 811.

The State of Texas maintains strong control over the District. *See, e.g.*, TEX. WATER CODE ANN. § 12.081 (Vernon 2000) (describing general supervision); *id.* § 49.194 (describing financial supervision). The state does not directly fund the District, but the state determines the feasibility of any District project and supervises the issuance of bonds. *Id.* § 49.181, § 49.184. Furthermore, the state has the general obligation to repay bonds issued at the District's request by the Water Development Board. *Id.* § 17.026. Upon dissolution, the District's assets escheat to the state. *Id.* § 49.327.

While the District may own property and sue or be sued in its own name (*id.* § 49.066(a), § 49.211(b)), the District

exists solely — pursuant to Article XVI, Section 59 — to serve the political mandate of "preservation and conservation of all natural resources of the state." *Id.* § 51.121(b). The District's authority is ***not*** limited to the boundaries of El Paso County. *Id.* § 49.211(b).

If the multi-factor test were applied to the District (which the District maintains is not necessary), then the facts supporting those factors would collectively and conclusively demonstrate that the District is an arm of the State of Texas entitled to Eleventh Amendment immunity. Both the trial court in this case and the panel of the Fifth Circuit that considered this appeal erred, to the detriment of the District, Eleventh Amendment law, and the right of states to determine the status of the political subdivisions they create.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted. Alternatively, the Court should summarily reverse the judgment of the Fifth Circuit and render judgment in accordance with *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d 208 (5th Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 177, 148 L. Ed. 2d 121 (2000).

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED MARCH 19, 2001

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-50485

SOUTHWESTERN BELL TELEPHONE COMPANY,

Plaintiff-Appellee,

VERSUS

CITY OF EL PASO, et al.,

Defendants,

and

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
El Paso Division

Before DUHÉ and PARKER, Circuit Judges, and LINDSAY,* District Judge.

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* District Judge of the Northern District of Texas, sitting by designation.

Appendix A

ROBERT M. PARKER, Circuit Judge:

Appellant El Paso County Water Improvement District No. 1 appeals the district court's denial of its motion to dismiss on Eleventh Amendment grounds. Because we conclude that the district court applied the proper legal standard in reviewing Appellant's motion, we AFFIRM.

I.

Appellant is a water improvement district created pursuant to Article XVI, Section 59, of the Texas Constitution. Appellant owns a series of irrigation ditches deeded from the United States Bureau of Reclamation to Appellant in January 1996. Development in the area of the ditches has resulted in the development of roads crossing the ditches and in an increase in the demand for telephone service, which is provided by installing telephone lines along such roads. Appellant has established certain application procedures for entities wanting to cross the canals, laterals, and ditches-rights-of-way owned by Appellant. Such procedures require an entity to complete an application, pay an application fee, and obtain a survey. The application must be preliminarily approved by Appellant's Board of Directors, which, upon completion of the survey, assesses a payment against the entity based on the length of the crossing.

Appellee, a telecommunications services provider, brought this action seeking declaratory and injunctive relief against the City of El Paso and Appellant for their alleged violation of the federal Telecommunications Act of 1996 ("FTA"), the Texas Public Utilities Regulation Act ("PURA"),

and other state law. Appellee and the City of El Paso have settled their claims. Appellee's claims against Appellant allege, *inter alia*, that under the FTA and PURA, Appellant cannot demand payment and a detailed application from Appellee for laying telephone lines that cross Appellant's rights-of-way.

In response, Appellant counterclaimed against Appellee for trespass and/or taking property for public use without compensation; more importantly, Appellant moved to dismiss Appellee's claims under the Eleventh Amendment, arguing that it was an arm of the State of Texas and thus Appellee's claims were barred by the Eleventh Amendment. The district court, applying our "arm-of-the-state" analysis noted in *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986), held that Appellant was not an arm of the State of Texas, and thus was not entitled to Eleventh Amendment immunity.

II.

We review the district court's order denying a motion to dismiss on Eleventh Amendment grounds as an appealable collateral order based on an issue of law, *see Champagne v. Jefferson Parish Sheriff's Office*, 188 F.3d 312, 313 (5th Cir. 1999) (per curiam), and we review the district court's conclusions of law *de novo*. *Id.*

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

> commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. "[T]he reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). However, the Eleventh Amendment bar to suit in federal courts only extends to states, state officials, and state instrumentalities in appropriate circumstances, and does not extend to counties, similar municipal corporations, and other political subdivisions, even though such entities enjoy a "slice of state power." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979); *Mt. Healthy City Bd. of Education v. Doyle*, 429 U.S. 274, 280 (1977); *Moor v. Alameda County*, 411 U.S. 693, 717-21 (1973); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

When determining whether a state agency or instrumentality may invoke the state's immunity as an arm of the state, courts must review the relationship between the state and the entity in question, examining the essential nature of the proceeding, the nature of the entity created by state law, and whether a money judgment against the instrumentality would be enforceable against the state. *Doe*, 519 U.S. at 429-30 (citing *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 576 (1946); *Mt. Healthy City*, 429 U.S. at 280; *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 45-51 (1994)).

Appendix A

We have stated that this arm-of-the-state analysis requires the examination of "the powers, characteristics and relationships created by state law in order to determine whether [a] suit is in reality against the state itself." *Hander v. San Jacinto Junior College*, 519 F.2d 273, 279 (5th Cir. 1975) (citing *Aerojet-General Corp. v. Askew*, 453 F.2d 819 (5th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972)); *see also Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982); *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 557 (5th Cir. Unit A 1982); *Jagnandan v. Giles*, 538 F.2d 1166, 1173-74 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977). In conducting such analysis, we have held that "comparisons [between like entities] cannot substitute for a careful examination of the particular entity at issue." *McDonald v. Board of Miss. Levee Comm'rs*, 832 F.2d 901, 908 (5th Cir. 1987); *see also Hudson v. City of New Orleans*, 174 F.3d 677, 681 (5th Cir.), *cert. denied sub nom. Connick v. Hudson*, 528 U.S. 1004 (1999); *Flores v. Cameron County*, 92 F.3d 258, 268 (5th Cir. 1996).

We have refined the arm-of-the-state analysis to require examination of a variety of factors concerning the particular entity in question. *See Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986). These factors include (1) whether the state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether it has the right to hold and use property. *Id.* These factors are examined as a whole, and no single factor is dispositive. *Id.* at 745; *see also United*

Carolina Bank, 665 F.2d at 557. However, the second factor, the source of the entity's funding, is "of considerable importance." *Doe*, 519 U.S. at 904; *Jacintoport v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 440-41 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986); *Laje*, 665 F.2d at 727.

Appellant argues that the district court erred by applying the arm-of-the-state analysis established in *Clark* because our prior decisions hold Appellant as an arm of the state entitled to Eleventh Amendment immunity. Specifically, Appellant argues that our decision in *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist.*, 222 F.3d 208 (5th Cir.), *cert. denied*, 121 S. Ct. 177 (2000), which affirmed the district court's finding of Eleventh Amendment immunity for Appellant, controls this action. Appellant also argues that our prior decisions in *Kamani v. Port of Houston Authority*, 702 F.2d 612 (5th Cir. 1983), and *Pillsbury Co. v. Port of Corpus Christi Authority*, 66 F.3d 103 (5th Cir. 1995), *cert. denied*, 517 U.S. 1203 (1996), held that the entities at issue in those cases were entitled to Eleventh Amendment immunity by virtue of their creation pursuant to Article XVI, Section 59, of the Texas Constitution. Because Appellant is also created under Article XVI, Section 59, Appellant argues that it is likewise entitled to immunity.

We disagree with both arguments. First, *Ysleta* is not controlling because it conflicts with our prior decisions requiring a careful examination of the nature of an entity claiming immunity. Although *Ysleta* affirmed the district court's holding that Appellant was an arm of the state entitled to immunity, it stated no reasons for the decision except to

say that the plaintiff's arguments in that appeal "lack[ed] merit." *Ysleta*, 222 F.3d at 208. In support of this conclusion, *Ysleta* cited *Kamani* and *Pillsbury* without further explanation. *Kamani* was an admiralty action in which the court stated without analysis that the Port of Houston Authority was "a 'creature of state law and a political subdivision of the State of Texas' " entitled to Eleventh Amendment immunity. *Kamani*, 702 F.2d at 613. *Pillsbury* was a breach-of-contract action in which the court held that the Port of Corpus Christi Authority was factually and legally indistinguishable from the Port of Houston Authority, and was thus entitled to immunity under *Kamani*. *Pillsbury*, 66 F.3d at 104.

Ysleta's conflict with prior decisions establishing the arm-of-the-state analysis originates with *Kamani*. Notwithstanding the arm-of-the-state analysis established by decisions such as *Hander*, *Jagnandan*, *United Carolina Bank*, and *Laje*, *Kamani* relied on *McCrea v. Harris County Houston Ship Channel Navigation Dist.*, 423 F.2d 605, 607 (5th Cir.), *cert. denied*, 400 U.S. 927 (1970), in concluding that the Port of Houston Authority was entitled to immunity. However, *McCrea* involved a wrongful death action under the Federal Employers' Liability Act that did not involve the Eleventh Amendment at all. In *McCrea*, the court simply observed that the Port of Houston Authority "is a creature of state law and a political subdivision of the State of Texas operating terminal facilities at the Port of Houston" in concluding that the port was not a "rail carrier" under the FELA. *McCrea*, 423 F.2d at 607. While *McCrea* did examine the port's organizational and operational characteristics, such examination is different from the arm-of-the-state analysis

required to determine whether an entity is entitled to Eleventh Amendment immunity. *See Jacintoport*, 762 F.2d at 440 ("It would be inconsistent with this Circuit's test for determining [Eleventh Amendment] immunity to rely on *Miller* [*v. Greater Baton Rouge Port Comm'n*, 74 So.2d 387 (La. 1954)], because immunity of the [entity at issue] was never an issue in that case."). In light of our decisions requiring the application of the arm-of-the-state analysis, *Kamani*'s quotation of *McCrea*'s statement that the Port of Houston is a "creature of state law and a political subdivision of the State of Texas" does not automatically support the conclusion that the Port of Houston Authority is entitled to Eleventh Amendment immunity. An entity is not an arm of the state for Eleventh Amendment purposes simply because it is a creature of state law and a political subdivision of a state. Such conclusion would entirely obviate the arm-of-the-state analysis because every entity claiming Eleventh Amendment immunity is a "creature" of some state law. Moreover, political subdivisions of states are generally *not* entitled to Eleventh Amendment immunity. *See Lake Country Estates*, 440 U.S. at 401; *Lincoln County*, 133 U.S. at 530-31. *Kamani*'s conclusion that the Port of Houston Authority was entitled to immunity by virtue of its status as a creature of state law and a political subdivision of Texas conflicts with the line of precedent beginning with at least *Hander*, *Jagnandan*, *United Carolina Bank*, and *Laje*.

Pillsbury continued the conflict by applying *Kamani* to hold that the Port of Corpus Christi Authority was entitled to Eleventh Amendment immunity. This result is not surprising because the Port of Corpus Christi Authority was held to be factually and legally indistinguishable from the

Port of Houston Authority in *Kamani*. While *Pillsbury* noted that a proper arm-of-the-state analysis would result in the same conclusion, the conflict created by *Kamani* was not addressed. In addition, the court suggested in dicta that its decision was controlled by *Kamani* because both ports were created pursuant to Article XVI, Section 59.

Ysleta thus rests on holdings that conflict with our prior decisions requiring an arm-of-the-state analysis for entities claiming Eleventh Amendment immunity, and the district court did not err when it applied *Clark*'s six-factor analysis. When two holdings or lines of precedent conflict, the earlier holding or line of precedent controls. *Billiot v. Puckett*, 135 F.3d 311, 316 (5th Cir.), *cert. denied sub nom. Billiot v. Anderson*, 525 U.S. 966 (1998). In this action, although *Kamani* was decided before *Clark*, *Clark*'s arm-of-the-state analysis is a consistent part of a line of precedent including at least *Hander*, *Jagnandan*, *United Carolina Bank*, and *Laje*, which were all decided before *Kamani*. Therefore, the district court properly applied *Clark* in denying Appellant's Eleventh Amendment argument. Moreover, even though *Ysleta* was decided before the district court issued its decision, it was published after that decision and thus was not precedent for the district court. *See* FIFTH CIR. R. 47.5.4.

We also reject Appellant's second argument that it is entitled to Eleventh Amendment immunity by virtue of its creation pursuant to Article XVI, Section 59. Even if *Kamani* and *Pillsbury* applied the proper arm-of-the-state analysis, they do not state that an entity is entitled to Eleventh Amendment immunity simply because they are created under a particular state law. While *Pillsbury* noted that both ports

were created pursuant to Article XVI, Section 59, there is no suggestion in that decision that the particular law under which an entity is created is the sole factor in determining the issue of immunity. Our decisions clearly forbid such a result. *See, e.g.*, *Jacintoport*, 762 F.2d at 439-40. Moreover, even though *Ysleta* affirmed the district court's conclusion that we established a "bright-line test" for determining whether an entity created pursuant to Article XVI, Section 59, is entitled to immunity, such a test is contrary to our decisions requiring the application of the arm-of-the-state analysis and to the principle that comparisons or analogies between like entities cannot substitute for a proper analysis of the particular entity claiming immunity. *See, e.g.*, *McDonald*, 832 F.2d at 908. Indeed, such a test is no test at all.

Finally, because Appellant does not challenge the district court's application of the individual factors of the arm-of-the-state analysis, we will not address such application. While Appellant argues in its reply brief that Appellee's defense of the district court's application of the factors is "fundamentally flawed," Appellant does not specifically challenge the district court's analysis, and we will not construe Appellant's argument as such.

III.

Based on the reasons stated above, we AFFIRM the district court's order denying Appellant's motion to dismiss on Eleventh Amendment grounds.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION DATED MAY 17, 2000 AND FILED MAY 22, 2000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil Action No. EP-98-CA-114-EP

SOUTHWESTERN BELL TELEPHONE COMPANY,

Plaintiff,

VS.

CITY OF EL PASO and EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Defendant.

ORDER

On this date the Court considered El Paso County Water Improvement District No. 1's Motion for Dismissal Pursuant to Eleventh Amendment, filed December 1, 1999 and Southwestern Bell's Response. El Paso County Water Improvement District No. 1's letter briefs have also been considered. Also on this date, the Court considered Southwestern Bell's Conditional Motion to Substitute Officials of El Paso County Water Improvement District No. 1, as well as the response to that motion. After careful consideration, the Court will deny the motion to dismiss and will deny the conditional motion as moot.

Appendix B

Background and Procedural History

Southwestern Bell Telephone Company ("SWBT"), a provider of telecommunications services holding a certificate of convenience and necessity issued by the Public Utility Commission of Texas ("PUC"), brought this suit for declaratory and injunctive relief originally against the City of El Paso ("City"). In its original petition, SWBT sought declarations that (1) a proposed city ordinance that would require SWBT to pay the City 5% of all gross revenues from services to customers within El Paso violated the Federal Telecommunications Act of 1996, 47 U.S.C. § 151 et seq., ("FTA"); (2) certain buyout provisions of a then-current ordinance as well as the proposed ordinance also violated the FTA; (3) the proposed ordinance violated the Texas Public Utilities Regulation Act, Title II of the Texas Utilities Code, ("PURA"); (4) the buy-out provisions violated Article 1416 of the Texas Revised Civil Statutes; (5) no SWBT property would be subject to the buyout provisions; and (6.) the buyout provision is unenforceable.

El Paso County Water Improvement District No. 1 ("District") was added as a Defendant in SWBT's First Amended Complaint. The District is a water improvement district operating under Article XVI, Section 59 of the Texas Constitution. At the center of the controversy between SWBT and the District is a series of irrigation ditches deeded from the federal Bureau of Reclamation to the District in January 1996. Development in the area of the ditches has resulted in a number of roads being built crossing ditches and has also resulted in an increase in demand for telephone service.

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The District has established certain application procedures for entities wanting to cross the canals, laterals and ditches. These procedures require an entity, such as SWBT, to complete an application, pay an application fee of $500 and obtain a survey. Before the survey is ordered, the District's Board of Directors must preliminarily approve the application. After the survey is completed, the Board assesses a charge, which can be determined on an ad hoc basis, based on the length of the crossing.

In its claims against the District, SWBT seeks declaratory relief, arguing that (1) the District's application procedures and fees violate both FTA and PURA; (2) roads and highways crossing the District's ditches and canals are public roadways; (3) the District has no right to charge for telephone lines crossing its canals and ditches when those lines are within the rights-of-way of city or county roads; (4) the water flowing through the District's canals and ditches is public; and (5) the District has no right to charge for telephone lines crossing public waters. The District filed a counterclaim, alleging that SWBT has trespassed on its property, or alternatively, that SWBT has taken its property for public use without compensating the District.

SWBT and the City have settled their claims, leaving the District as the only defendant remaining in the case.

Standards for Eleventh Amendment Immunity

The District moves to dismiss this case on the basis that it is barred by the Eleventh Amendment. In the absence of valid Congressional abrogation or state consent, the Eleventh

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Amendment prohibits a plaintiff from suing a state in federal court. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2223 (1999).

The District argues that it is a branch of the state and is, therefore, immune from suit. SWBT argues that the District is more like a municipality, county or a school district, none of which are protected by Eleventh Amendment immunity. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

In *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986), the Fifth Circuit established a six-factor test for determining whether an entity is a branch of the state for purposes of the Eleventh Amendment. These factors are:

1.) Whether the state statutes and case law view the agency as an arm of the state:

2.) The source of the entity's funding;

3.) The entity's degree of local autonomy;

4.) Whether the entity is concerned primarily with local, as opposed to statewide, problems;

5.) Whether the entity has the authority to sue and be sued in its own name; and

6.) Whether the entity has the right to hold and use property.

Hudson v. City of New Orleans, 174 F.3d 677, 679 (5th Cir. 1999). *See also Clark*, 798 F.2d at 744-45.

However, there is another line of Fifth Circuit case law on this subject to which the District directs the Court's attention. In this line of cases, port authorities, which also operate under Article XVI, Section 59 of the Texas Constitution, are held to be immune arms of the state. *Pillsbury Co., Inc. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104 (5th Cir. 1995); *Kamani v. Port of Houston Auth.*, 702 F.2d 612 (5th Cir. 1983).

The District argues that, based on these cases, the Fifth Circuit has created a bright-line test for entities organized and operated under Article XVI, Section 59 of the Texas Constitution, and that an examination of the *Clark* factors would be inappropriate. Particularly, the District points to language in *Pillsbury* emphasizing the creation of the port authority pursuant to Article XVI, Section 59 of the Texas Constitution. *Pillsbury*, 66 F.3d at 104-05.

The Court is convinced that the language in *Pillsbury* does not have the broad significance that the District would attribute to it. The basis for the Fifth Circuit's decision in *Pillsbury* is that the Port of Corpus Christi Authority is factually and legally indistinguishable from the Port of Houston Authority, which the court in *Kamani* had previously held immune from suit under the Eleventh Amendment. *Pillsbury*, 66 F.3d at 104. Therefore, *Pillsbury* was essentially decided on the basis of stare decisis.

Kamani, too, was decided on the basis of a previous case, *McCrea v. Harris County Houston Ship Channel Navigation*

Dist., 423 F.2d 605 (5th Cir. 1970). The court in *Kamani*, in holding the Houston port immune from suit, cited *McCrea*'s statement that the Port of Houston Authority was "a creature of state law and a political subdivision of the State of Texas." *Kamani*, 702 F.2d at 613. In *McCrea*, the issue of whether the Houston port was an arm of the state for Eleventh Amendment purposes was never raised; rather, the court was describing the Harris County Houston Ship Channel Navigation District. *McCrea*, 423 F.2d at 607. Therefore, neither *Kamani* nor *McCrea* hold that an entity created and run under Article XVI, Section 59 of the Texas Constitution is automatically protected by the Eleventh Amendment.

Further, the context of the statement in *Pillsbury* indicates that the Fifth Circuit did not intend to create a bright-line test for Eleventh Amendment immunity. The plaintiff in *Pillsbury* had argued that the Supreme Court case *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), overruled *Kamani*. In *Hess*, the Supreme Court held that a bi-state railroad created by an interstate compact was not subject to Eleventh Amendment immunity. *Hess*, 513 U.S. at 38. The *Pillsbury* court distinguished the analysis in *Hess* by stating:

> We view *Hess* as a limited holding addressing the standard to be applied to bi-state entities not created pursuant to state statute. Because the Corpus Port and the Houston Port were both created and still operate pursuant to Article XVI, Section 59 of the Texas Constitution, *Hess* does not overrule *Kamani* or control the disposition of this appeal.

Pillsbury, 66 F.3d at 104-05.

Thus, in context, the court in *Pillsbury* is not indicating that there should be a bright line rule — that everything created pursuant to a particular section in the Texas Constitution is entitled to immunity — but is instead distinguishing the facts before it from the facts before the Supreme Court in *Hess.*[1] Therefore, the Court will examine the six *Clark* factors to determine the status of the District.

The six factors

The six *Clark* factors are not given equal weight, and it is common for several of the factors to weigh in favor of viewing the entity as an arm of the state and for several to weigh against it. *Hudson*, 174 F.3d at 682-83.

The source of the District's funding

Of the six *Clark* factors, the source of the entity's funding has been held to be the most important. *Hudson*, 174 F.3d at 679; *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147 (5th Cir. 1991). This is essentially a question of whether the state would be liable for a judgment against the entity. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 (1997). The Court notes that SWBT is not seeking any monetary damages from the District.

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1. *Cf. Flores v. Cameron County*, 92 F.3d 258, 268 (5th Cir. 1996) ("analogies between like entities cannot replace consideration of the six relevant factors"); *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982) ("[a] federal court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself").

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The District is funded by local user fees (assessments), local taxes and bonds. *See* TEX. WATER CODE § 49.107 (authorizing a district to levy and collect taxes for operation and maintenance); *Id.* at § 55.354 (assessments); *Id.* at § 55.491 (authorizing bond election); *Id.* at § 55.491 (amount of the bonds should be sufficient to pay for proposed improvements); *Id.* at § 55.651 *et seq.* (levying taxes to pay principal and interest on bonds).

More importantly, it appears that the District itself, and not the state, is responsible for any judgments against it. *Harris County Flood Control Dist. v. Mihelich*, 525 S.W.2d 506 (Tex. 1975); Op. Att'y Gen. No. H-1111, 1978 WL 24366 (Jan. 6, 1978) (both stating that a judgment against district operating pursuant to Article XVI, Section 59 of the Texas Constitution should be paid from the district's maintenance fund). See also TEX. WATER CODE § 49.066(b) (a state court rendering judgment against a district may order the district to collect taxes to pay the judgment). Therefore, a judgment against the District would not be paid from the state treasury.

How state law views the District

Although not binding on the Court, whether state law views the entity as an alter ego of the state is relevant to the determination of Eleventh Amendment immunity. The Texas Supreme Court has held that political subdivisions created by the Texas Legislature under article XVI, section 59 of the Texas Constitution are immune from suit in Texas courts. *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 812 (Tex. 1993). Although the entity at issue in *Guillory* was a port

authority, the Texas Supreme Court also addressed the immunity of water improvement districts. Specifically, the Texas court stated that "[w]ater improvement districts . . . are different from municipalities in that the former are created by the Legislature for general public purposes, while the latter are created by consent of their inhabitants." *Guillory*, 845 S.W.2d at 814.

The Texas Supreme Court also stated that the Houston Port Authority was immune from federal suit, based on *Kamani*. *Guillory*, 845 S.W.2d at 815. Because the same port authority was involved in both *Kamani* and *Guillory*, these statements do not persuade the Court that the District is immune under the Eleventh Amendment.

The district's degree of local autonomy

The District is run by a Board of Directors consisting of five locally elected directors who own land within the District. TEX. WATER CODE §§ 55.101; 55.102. The Board of Directors is permitted to purchase or make improvements and facilities for irrigation without state approval. *Id.* at § 55.163. Likewise, the District is authorized to enter into contracts with the United States without state approval. *Id.* at § 55.185. The District can also set its own fees, sell its property and annex land. *Id.* at §§ 49.212, 49.226, 49.301-.302. On the other hand, before a district can issue bonds to fund a project, the project must be approved by the Texas Natural Resource Conservation Commission. *Id.* at § 49.181. Nevertheless, on the whole, the District appears to have a significant amount of local autonomy.

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Whether the district is concerned primarily with local, as opposed to statewide, problems

Although the use of water is of concern to the entire state of Texas, the District's powers appear limited to address issues of local concern. The Court notes the Texas Supreme Court's statement that entities created under Article XVI, Section 59 of the Texas Constitution are for "general public purposes." *Guillory*, 845 S.W.2d at 814. Nevertheless, on the whole, it appears that the District is primarily concerned with the area within the District itself. The purposes of a water improvement district are:

> (a) to provide for irrigation of land within its boundaries.
>
> (b) to furnish water for domestic, power, and commercial purposes.
>
> (c) to cooperate with the United States under federal reclamation laws for the purpose of construction, operation and maintenance of irrigation and drainage facilities necessary to maintain the land's irrigability and to assume debts to the United States on account of district lands

See TEX. WATER CODE § 55.161.

These purposes strongly suggest that the District is primarily concerned with local problems.

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Whether the entity has the right to sue and be sued in its own name & whether the entity has the right to hold and use property.

These two factors are frequently considered to be the least important. *See Hudson*, 174 F.3d at 682. A water district is permitted to sue in its own name. *See* TEX. WATER CODE § 49.066(a) (a district, including a water improvement district, may sue and be sued); *Id.* at § 55.504 (before selling bonds, a water improvement district is to bring suit in district court); *City of Pelly v. Harris County Water Control and Improvement Dist. No. 7*, 195 S.W.2d 241 (Tex. Civ. App. — Galveston 1946) (rev'd on other grounds).

Likewise, a water district can acquire property. TEX. WATER CODE § 49.218; *See also Id.* at 49.222 (eminent domain); *El Paso County Water Improvement Dist. No. I v. City of El Paso*, 133 F.Supp. 894, 914 (W.D.Tex. 1995) (the District has "a broad right of eminent domain").

Motion to Substitute Plaintiffs

In light of the Court's decision, it is unnecessary to decide whether SWBT could substitute the District's directors as defendants. The Court notes, however, that *Ex Parte Young* permits suit for prospective declaratory or injunctive relief against a state officer in his or her official capacity. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex Parte Young*, 209 U.S. 123 (1908). Based on the nature of the suit and the prospective relief sought in this case, the *Ex Parte Young* doctrine would seem applicable. Therefore, if the District were considered an arm of the state for Eleventh

Amendment purposes, the suit would be permitted to go forward by substituting the Directors of the District for the District itself.

Conclusion

ACCORDINGLY, it is ORDERED that El Paso County Water Improvement District No. 1's Motion for Dismissal Pursuant to Eleventh Amendment (Docket No. 49) is DENIED. It is also ORDERED that Southwestern Bell's Conditional Motion to Substitute Officials of El Paso County Water Improvement District No. 1 (Docket No. 55) is DENIED AS MOOT.

s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 25, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50485

SOUTHWESTERN BELL TELEPHONE COMPANY

Plaintiff – Appellee

v.

CITY OF EL PASO; ET AL

Defendants

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO 1

Defendant – Appellant

Appeal from the United States District Court for the Western District of Texas, El Paso

ON PETITION FOR REHEARING EN BANC
(Opinion 3/19/01, 5 Cir., __, __ F.3d __)

Appendix C

Before DUHÉ and PARKER, Circuit Judges, and LINDSAY,* District Judge.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT

s/ Robert M. Parker
United States Circuit Judge

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* District Judge of the Northern District of Texas, sitting by designation.

Judges King and Jones did not participate in the consideration of the petition for rehearing en banc.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, PECOS DIVISION DISMISSING CASE ON ELEVENTH AMENDMENT GROUNDS IN *YSLETA DEL SUR PUEBLO v. EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1* DATED NOVEMBER 13, 1998 AND FILED NOVEMBER 16, 1998

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

P-98-CA-27

YSLETA DEL SUR PUEBLO

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

ORDER DISMISSING CASE ON ELEVENTH AMENDMENT GROUNDS

BEFORE THE COURT in the above-captioned cause of action is Plaintiff's Motion for Order on Eleventh Amendment and Other Immunity Issues, filed September 23, 1998, Defendant's Response, filed October 5, 1998, and Plaintiff's Letter Brief in Reply to Defendant's Response, filed October 8, 1998. After due consideration, the Court is of the opinion that Plaintiff's claim should be dismissed for lack of jurisdiction.

Appendix D

Factual and Procedural Background

The Plaintiff, the Ysleta del Sur Pueblo ("Tribe"), a federally recognized Indian tribe, seeks to eject El Paso County Water Improvement District No. 1 ("EPCWID") from property EPCWID possesses in the present day Ysleta and Socorro Grants in El Paso County, Texas and seeks damages resulting from EPCWID's alleged trespass on such property. The Tribe filed its Complaint on March 11, 1998, asserting that the Tribe is rightfully entitled to possess the subject property based on a 1751 Spanish Grant and a prior aboriginal right of possession. The Tribe alleges that neither the Kingdom of Spain, its successor the Republic of Mexico, or the Republic of Texas ever terminated the Tribe's legal title in any of its lands or its aboriginal right to possess its lands. Further, the Tribe claims its legal title and aboriginal rights are protected by the 1848 Treaty of Guadalupe Hidalgo, 9 Stat. 922 and the Trade and Intercourse Act, ch. 33, 1 Stat. 137 ("the Indian Non-Intercourse Act"), as amended. Through various Relinquishment Acts, the state of Texas relinquished the subject properties to the people of the towns of Ysleta and Socorro, respectively.

Defendant El Paso County Water Improvement District No. 1 acts as an agent of the State of Texas in handling individual contracts between water users and the United States and to levy taxes and assessments on lands involved in the Rio Grande Reclamation Project, and was organized in accordance with the general laws of Texas and pursuant to Article XVI, section 59 of the Constitution of the State of Texas. (Defendant's Original Answer ¶¶ 45-47.) EPCWID contends that the Tribe was not a federally recognized Indian

tribe prior to 1968 and that non-Indian land is the subject of this litigation. Consequently, EPCWID denies that the Indian Non-Intercourse Act, federal Indian common law, or the Treaty of Guadalupe Hidalgo apply to this case. EPCWID denies that the Tribe is entitled to possess the subject property, whether under a 1751 Spanish Grant or any alleged prior aboriginal right of possession.

EPCWID claims that it is a political subdivision of the State of Texas and as such possesses sovereign immunity to suit and is immune to the Tribe's claims for damages. It also asserts the affirmative defenses of laches and statute of limitations, and further claims that if the Tribe ever had any aboriginal right of possession to the subject lands, such right was extinguished long ago by the actions of the United States.

Plaintiff's (the Tribe's) Motion requests the Court to affirm its jurisdiction over EPCWID or to dismiss the case based on Eleventh Amendment immunity. The Tribe acknowledges that EPCWID is a political subdivision of the State of Texas, organized and existing pursuant to Article XVI, Section 59 of the Constitution of the State of Texas, but claims it is not an alter-ego agency of the State (Original Complaint ¶5; First Amended Original Complaint ¶5.)

EPCWID urges that this action should be dismissed because, as a political subdivision operating pursuant to Article XVI, Section 59 of the Texas Constitution, it is entitled to sovereign immunity.

Appendix D

Discussion

Is the Water District Entitled to Sovereign Immunity?

EPCWID asserts that the Tribe's claims are barred by the Eleventh Amendment to the United Status Constitution, which provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State. U.S. CONST. amend XI. Thus, a state is constitutionally immune from actions brought in federal courts by its own citizens or citizens of other states, unless it consents to be sued. *Hans v. Louisiana,* 134 U.S. 1, 3, 19 (1890); *Scott v. Board of Supervisors of La. State Univ.*, 336 F.2d 557, 553 (5th Cir. 1964); *Edelman v. Jordan,* 415 U.S. 651, 663 (1974); *Florida Dep't of States v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982); *In re State of New York,* 256 U.S. 490, 497 (1921). *See also Aerojet-General Corp. v. Askew,* 453 F.2d 819, 828 (5th Cir. 1971) (setting forth a two-pronged test for the existence of Eleventh Amendment immunity: (1) whether the action is against the state, and (2) if so, whether the state consented to be sued in the federal courts), and *Voism's Oyster House, Inc. v. Guidry,* 799 F.2d 183, 185-86 (5th Cir. 1986) (noting that Eleventh Amendment bars suits in federal court by citizens of a state against their own state or a state agency or department). Sovereign immunity of the Eleventh Amendment restricts suits against states by sovereigns as well as by individuals. *Monaco v. Mississippi,* 292 U.S. 313, 321-22, 330 (1933) (holding that a state, without counting, may not be sued by its own citizens,

foreign corporations, other states, or foreign states). Eleventh Amendment immunity also applies to a suit by an Indian tribe against a state. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782 (1991) (recognizing the Indian tribes enjoy immunity against suit by the states and vice versa); *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 117 S.Ct. 2028 (1997) (according Indian tribes the same status as foreign sovereigns and recognizing that sovereign immunity restricts suits by sovereigns against sovereigns). Plaintiff concedes in its pleadings that the Ysleta del Sur Pueblo is a federally recognized Indian tribe. (Original Complaint ¶4; First Amended Original Complaint ¶4). The Tribe and a fortiorari its members are therefore subject to Eleventh Amendment immunity. *Coeur d'Alene Tribe,* 117 S.Ct. at 2033-34.

A State can waive its sovereign immunity and consent to being sued. *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984), citing *Clark v. Barnard,* 108 U.S. 436, 447 (1383); *Coeur d'Alene Tribe,* 117 S.Ct. at 2033. The State's consent, however, must be unequivocally expressed. *Pennhurst,* 465 U.S. at 99, citing *Edelman v. Jordan,* 415 U.S. 651, 673 (1974); *Papasan v. Allain,* 478 U.S. 265, 276 n.10 (1986). Absent such waiver, neither a state or agencies acting under its control are subject to suit in federal court. *Sherwinski v. Peterson,* 99 F.3d 849, 851 (5th Cir. 1996), citing *Puerto Rico Aquaduct and Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993).

A clear showing of congressional purpose is required to abrogate Eleventh Amendment immunity, such as enactment of a federal statute that explicitly and on its face indicates an intent to sweep away the immunity of the States or that

has a history which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States. *Quern v. Jordan,* 440 U.S. 332, 343-45 (1979) (holding that 42 U.S.C. § 1983 does not override state's Eleventh Amendment immunity). *See also Pennhurst,* 465 U.S. at 99, quoting *Quern,* 440 U.S. at 342 (requiring an unequivocal expression of congressional intent to "overturn the constitutionally guaranteed immunity of the several States" in the context of civil rights legislation and the Fourteenth Amendment). In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, the Court will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction ." *Edelman,* 415 U.S. at 673, quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171 (1909).

In *Idaho v. Coeur d'Alene Tribe,* a federally recognized Indian tribe brought suit against the state and its officials and agencies, alleging an ongoing violation of its property rights in contravention of federal law. 521 U.S. 261, 117 S.Ct. 2028, 2040 (1997).[1] Specifically, the Coeur d'Alene

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1. The Coeur d'Alene Tribe requested injunctive relief in *Idaho v. Coeur d'Alene Tribe,* seeking to invoke the *Ex parte Young* exception to the Eleventh Amendment bar. 117 S.Ct. at 2043. In *Ex Parte Young,* the Supreme Court recognized an exception to a state's Eleventh Amendment immunity for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. 117 S.Ct. at 2030; *Ex Parte Young,* 209 U.S. 123 (1908). While the Supreme Court did find the *Young* doctrine applicable, it allowed claims for declaratory and injunctive relief to

(Cont'd)

Tribe ("CDA Tribe") claimed ownership in the submerged lands and bed of Coeur d'Alene Lake and various of its navigable tributaries and effluents lying within the original boundaries of the Coeur d'Alene Reservation. *Id.* at 2030-32. In the alternative, the CDA Tribe claimed ownership of the submerged lands pursuant to unextinguished aboriginal title. *Id.* at 2032. The Coeur d'Alene Tribe asked the Court to declare that the disputed lands were for the exclusive use, occupancy and enjoyment of the tribe and to invalidate all statutes and regulations purporting to regulate the lands. *Id.* The Court found that the CDA Tribe's suit was the functional equivalent of a quiet title action which implicates special sovereignty interests. *Id.* at 2040. As such, the CDA Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent, because the Eleventh Amendment would bar it. *Id.* Although the relief requested is not as extensive, the nature of suit in the instant case is strikingly similar to that of the *Coeur d'Alene* suit: the Ysleta del Sur Pueblo seeks to establish its rightful title to certain property within the Ysleta and Socorro Grants and to exclude EPCWID from possession. On these facts, the instant suit too is the functional equivalent of a quiet title action, and thus cannot be maintained in federal court without the consent of the State of Texas. *See id.* To hold otherwise would allow the federal court to summon a state before it in a private action seeking to divest the state of a property interest, a power clearly beyond the Court's authority

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(Cont'd)
proceed only insofar as they sought to preclude ongoing violations of federal law. *Id.* Because the Ysleta del Sur Pueblo Tribe did not include state officers as defendants, the *Ex Parte Young* exception has no application in the instant case.

to act. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699-700 (1932).

The instant case is a property rights suit seeking relief in the form of ejectment and damages resulting from trespass. The federal statutes implicated include the Indian Non- Intercourse Act and any treaties which may have been codified. State statutes at issue include various Relinquishment Acts. Neither party has cited any evidence of Congressional or state legislative intent to abrogate Eleventh Amendment immunity in these particular acts of legislation. Likewise, neither party has established by state statute or otherwise that either the State of Texas or its agent El Paso County Water Improvement District No. 1 consented to be sued. Consequently, the Eleventh Amendment bars the Tribe's claim in federal court against the State of Texas.

Having determined that the Tribe's claim is barred by the Eleventh Amendment if asserted against the State, the question that remains is whether the State of Texas is the real party in interest in this suit brought against EPCWID. The nature of the suit as one against the State is to be determined by the essential nature and effect of the proceeding. *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945). The Fifth Circuit Court of Appeals has taken a case-by-case approach to determining whether a State is the real party in interest in suits brought against entities which appear to be alter egos of the State. *Richardson v. Southern Univ.*, 118 F.3d 450 (5th Cir. 1997). "A federal court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against

the state itself." *Id.*, citing *Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 874 (5th Cir.), in turn quoting *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982)), *cert. denied*, 502 U.S. 866 (1991). *See also Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (finding school board was more like county or city than it was like arm of state, and it therefore was not entitled to assert Eleventh Amendment immunity where, under state law, "state" did not include "political subdivisions" and "political subdivisions" did include local school district); *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir. 1981) (concluding that Rusk State Hospital is an arm of the state for Eleventh Amendment purposes because it is a state institution under exclusive control of Texas Department of Mental Health and Mental Retardation). The Fifth Circuit identifies six factors that guide its determination of whether a particular entity is an arm of the State:[2]

(1) whether the state statutes and case law characterize the agency as an arm of the state;

(2) the source or the funds for the entity;

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2. This "test" is identical to the test applied by the Fifth Circuit in diversity jurisdiction case law, to determine whether a governmental body could be considered a "citizen" or alter ego of a state. *Richardson*, 118 F.2d at 452 n.8, citing *PYCA Indus., Inc. v. Harrison County Waste Management Dist.*, 81 F.3d 1412, 1416 n.2 (5th Cir. 1996) (" '[T]he analysis of an [entity's] status is virtually identical whether the case involves determination of immunity under the Eleventh Amendment or a determination of citizenship for diversity purposes.' " (quoting *Tradigrain, Inc. v. Mississippi State Port Auth.*, 701 F.2d 1131, 1132 (5th Cir. 1983)).

(3) the degree of local autonomy the entity enjoys;

(4) whether the entity is concerned primarily with local, as opposed to state-wide problems;

(5) whether the entity has authority to sue and be sued in its own name; and

(6) whether the entity has the right to hold and use property.

Delahoussaye v. City of New Iberia, 93 7 F.2d 144, 147 (5th Cir. 1991), citing *Minton v. St. Bernard Parish School Bd.,* 803 F.2d 129, 131 (5th Cir. 1986) (footnote omitted) (quoting *Clark v. Tarrant County,* 798 F.2d 736, 744 (5th Cir. 1986)). Applying this test in *Delahoussaye*, a state university was determined to be an arm of the State and thus entitled to Eleventh Amendment immunity. *Delahoussaye,* 937 F.2d at 147. Similarly in *Richardson,* a state university and its board of supervisors were entitled to sovereign immunity in an action by a student, as the state was the real party in interest. *Richardson,* 118 F.3d at 456. In applying the *Delahoussaye* factors to the Greater New Orleans Express Commission ("GNOEC"), however, the Court concluded that the GNOEC was not an arm of the state and, therefore, was not shielded by the state's Eleventh Amendment immunity. *Pendergrass v. Greater New Orleans Express Comm'n,* 144 F.3d 342, 343 (5th Cir. 1998). *See also McDonald v. Board of Miss. Levee Comm'rs,* 832 F.2d 901 (5th Cir. 1987) (finding that Board of Mississippi Land Commissioners was not arm of state and was not entitled to Eleventh Amendment immunity, even though its existence was mandated by State Constitution).

Appendix D

The fact that EPCWID may be cloaked with some indicia of state power may not be sufficient to immunize it from suit in federal court. The United States Supreme Court has consistently refused to construe the Eleventh Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.' *Lake Country Estates v. Tahoe Reg'l Planning Agency,* 440 U.S. 391, 400-01 (1979). A county does not occupy the same position as a state for purposes of the Eleventh Amendment; a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment. *Edelman,* 415 U.S. at 667 n.12 (1974). In examining EPCWID to determine whether the suit is in reality a suit against the state itself, EPCWID may nevertheless qualify for sovereign immunity if the state is a necessary party to the suit. *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n,* 762 F.2d 435, 438 (5th Cir. 1985).

Jacintoport predates *Delahoussaye* and *Clark* (on which *Delahoussaye* is based), and sets forth the Fifth Circuit's multi-factor test to determine immunity under the Eleventh Amendment. *Id.* at 438-40, 442. *Clark* adopts the *Jacintoport* factors. The *Delahoussaye* factors are essentially identical to the *Jacintoport* factors, although *Delahoussaye* does not directly cite *Jacintoport*. In *Jacintoport,* the factor that "subsumes all others" is the treatment of the entity in state courts. *Id.* at 438, citing *Huber, Hunt & Nichols v. Architectural Stone Co.,* 625 F.2d 22, 25 (1980). Other factors comprising the Fifth Circuit's test for Eleventh Amendment immunity in *Jacintoport* include:

(1) financial independence, that is, whether the judgment will be satisfied by the entity's funds or by state appropriations, and other aspects of financial autonomy, such as the extent of the state's liability for the entity's general debts and obligations (as opposed to liability for a judgment);

(2) the entity's degree of local autonomy and control, and most importantly, whether the funds to defray any award would be derived from the state treasury, including an analysis of the extent of the entity's independent management authority;

(3) whether the agency has express authority to sue and be sued in its corporate name;

(4) whether the agency has been granted the right to hold and use property; and

(5) whether the agency is primarily concerned with local, as opposed to statewide, problems.

Jacintoport, 762 F.2d at 438-40, 442 (citations omitted). In a typical situation, some of these factors will point to immunity, while others will just as strongly suggest that the entity is an independent political subdivision not entitled to immunity. *Id.* at 442, citing *Tradigrain,* 701 F.2d at 1133. The Court "must never, however, lose sight of the primary question involved: whether the state is the real party in interest in the lawsuit nominally brought against the agency". *Id.*

Appendix D

Several years after the *Jacintoport* decision and without considering factors similar to those in *Jacintoport,* the Texas Supreme Court reached the conclusion that the Port of Houston Authority is a political subdivision of the State that is protected by governmental immunity except to the extent that it has been waived. *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 813 (Texas 1993). The *Guillory* court reasoned that governmental units created under article XVI, section 59 of the Texas Constitution are entirely governmental in function. *Id.* at 814. The Court affirmed the Texas Court of Appeals' holding that a navigation district like the Port Authority is such a political subdivision, which can act only in a governmental capacity and not in a proprietary capacity. *Id.* at 813. The *Guillory* Court further stated that "[w]ater improvement districts . . . created under [article XVI, section 59] are created by the Legislature for general public purposes" and that immunity is applied on the basis of creation of the governmental unit. *Id.* at 814. This decision was consistent with the Fifth Circuit's ruling in *Kamani v. Port of Houston Auth.*, 702 F.2d 612, 613 (5th Cir. 1983), which classified the Port of Houston Authority as "a creature of state law and a political subdivision of the State of Texas," entitling it to Eleventh Amendment sovereign immunity from a maritime tort claim.

Nine years after the Fifth Circuit's *Jacintoport* decision, the United States Supreme Court declined to find the Port Authority Trans-Hudson ("PATH") entitled to Eleventh Amendment immunity in a suit by injured railroad workers against PATH, seeking recovery under Federal Employers' Liability Act (FELA). *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994). The Court first determined

that there was no genuine threat to the dignity of New York or New Jersey in allowing the workers to pursue FELA claims in federal court. It then focused on determining whether there was good reason to believe the states and Congress designed the Port Authority to enjoy Eleventh Amendment immunity. *Id.* at 46. The Court recognized that the impetus for the Eleventh Amendment is the prevention of federal court judgments that must be paid out of a State's treasury. *Id.* The Court went on to state that the proper focus of an Eleventh Amendment inquiry is on losses and debts. *Id.* at 51. If the State is not obligated to bear and pay the resulting indebtedness of the enterprise when expenditures of the enterprise exceed receipts, then the Eleventh Amendment's core concern is not implicated. *Id.*

One year after *Hess* was decided, the Fifth Circuit reverted again to its *Kamani* analysis, finding the Port of Corpus Christi Authority legally and factually indistinguishable from the Port Authority of Houston ("a creature of state law and a political subdivision of the State of Texas" entitled to Eleventh Amendment immunity). *Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104 (5th Cir. 1995). The Court reasoned that, because the Corpus Port and the Houston Port were both created and still operate pursuant to Article XVI, Section 59 of the Texas Constitution, *Hess* did not overrule *Kamani* or control the disposition of the case. *Id.*

Fortunately, the Fifth Circuit's apparent "bright-line" test established in *Pillsbury* makes it unnecessary for this Court to engage in either the *Delahoussaye / Jacintoport* or the *Hess* analyses to determine whether EPCWID is an entity whose nexus with the state entities it to assert sovereign

immunity. As helpfully referenced in EPCWID's Response, the history and nature of EPCWID are summarized as follows:

> The plaintiff District was established in 1917 under the authority of a Texas Statute. Later it was converted into a conservation and reclamation district under the Constitution of Texas, Vernon's Ann. St. Const. Tex. art. 16, [section] 59, but without any change of name. Under the statute it has a broad right of eminent domain 'and the authority hereby conferred shall authorize and empower such districts to condemn all lands, private and public, for the purpose herein indicated, beyond the boundary of such districts and in any county within the State of Texas', and it also has the power of taxation. In fact, such districts and various other similar districts are not classed with municipal corporations, but are held to be political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law.
>
> It is not only an arm of the State, but is fashioned to perform public service and duties of high importance in the welfare of the people of Texas.

El Paso County Water Improvement District No. 1 v. City of El Paso, 133 F. Supp. 894, 914 (D.C. 1955), *reformed in part on other grounds and aff'd in part,* 243 F.2d 917, *cert. denied,* 355 U.S. 820 (1957). As earlier stated, Plaintiff

(the Tribe) acknowledges in its Amended (and Original) Complaint that EPCWID is a political subdivision of the State of Texas, organized and existing pursuant to Article XVI, Section 59 of the Texas State Constitution. The Court will therefore apply the *Kamani/Guillory/Pillsbury* approach regarding entities created under Article XVI, section 59 of the Constitution of the State of Texas in this case. Thus, EPCWID is entitled to Eleventh Amendment immunity by virtue of how it was created and is operated.

Eleventh Amendment sovereign immunity deprives a federal court of jurisdiction to hear a suit against a state. *Warnock v. Pecos County, Tex.*, 88 F.3d 341 (5th Cir. 1996), citing *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Because this Court has no jurisdiction to decide the Tribe's claim, it must be dismissed.

Finding *Pillsbury* wholly dispositive, the Court declines to reach the issue of whether either the *Hess* analysis or the six-factor balancing test set forth in *Jacintoport* and *Delahoussaye* results in a finding of sovereign immunity.

Conclusion

Because El Paso County Water Improvement District No. 1 was created and still operates pursuant to Article XVI, Section 59 of the Texas Constitution, it is entitled to sovereign immunity under the Eleventh Amendment. Therefore, this action should properly be dismissed because this Court lacks jurisdiction to entertain the Ysleta del Sur Pueblo's claim. Accordingly,

Appendix D

IT IS ORDERED that Plaintiffs' Complaint be **DISMISSED** for lack of jurisdiction. Costs are assessed against Plaintiff.

All other pending motions are **DENIED AS MOOT**.

SIGNED this 13 day of November, 1998.

s/ Lucius D. Bunton
LUCIUS D. BUNTON, III
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX E — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *YSLETA DEL SUR PUEBLO v. EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1* DATED APRIL 10, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-51203
Summary Calendar

YSLETA DEL SUR PUEBLO,

Plaintiff-Appellant,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Defendant-Appellee.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Not Party.

April 10, 2000.

* * *

Appeal from the United States District Court for the Western District of Texas.

Appendix E

Before POLITZ, WIENER and STEWART, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant The Ysleta Del Sur Pueblo ("Pueblo") appeals the district court's dismissal of its complaint against the El Paso County Water Improvement District No. 1 ("District") for lack of jurisdiction. The Pueblo argues that 1) the district court erred in determining that the District is the alter ego of the State of Texas and therefore immune to suit pursuant to the Eleventh Amendment, 2) Congress abrogated the State's Eleventh Amendment immunity in the Indian Non-Intercourse Act, 25 U.S.C. § 177, and 3) the State, by transacting in the Pueblo's lands, constructively waived Eleventh Amendment immunity by engaging in an activity regulated by Congress. Southwestern Bell Telephone Company ("Southwestern Bell") has filed a motion for leave to file an amicus brief out of time, which the District opposes.

We find that Southwestern Bell's motion is untimely, that the issue Southwestern Bell seeks to address has been adequately briefed by the Pueblo and the District, and that granting Southwestern Bell's motion would result in the needless delay of this case's disposition. *See* Fed. R. App. P. 29. Accordingly, Southwestern Bell's motion is denied.

We have reviewed the record and briefs submitted by the parties and find that the Pueblo's arguments lack merit. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S.Ct. 2219, 2226, 144 L.Ed.2d 605 (1999); *Ysleta Del Sur Pueblo v. Laney,*

199 F.3d 281, 286-88 (5th Cir.2000); *Pillsbury Co., Inc. v. Port of Corpus Christi Authority,* 66 F.3d 103, 104 (5th Cir.1995); *Kamani v. Port of Houston Authority,* 702 F.2d 612, 613 (5th Cir.1983).

AFFIRMED.

Supreme Court, U.S.
FILED
AUG 20 2001
OFFICE OF THE CLERK

No. 01-116

In The

Supreme Court of the United States

EL PASO COUNTY WATER
IMPROVEMENT DISTRICT NO. 1,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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STATEMENT OF THE CASE

This case arises in connection with a recent El Paso County Water Improvement District No. 1 (EPCWID) initiative whereby it claims the right to demand payment for crossing over ditches it maintains in and around El Paso, Texas from users of public roads and ways. It claims to be immune to the various state and federal laws that give telecommunications companies and others the right to use the public ways without making payment to the state or local governmental entities because, according to EPCWID, it is a private property owner whose interests are not subject to or controlled by Texas law. Despite its own position in this case, EPCWID also claims that it is an alter ego of the State. Indeed, notwithstanding its claimed identity with the State, EPCWID has informed the Texas Attorney General in connection with this case that it intends to argue that the Texas law protecting telephone utilities from local abuses of the sort attempted here is unconstitutional.[1]

The District Court and the Fifth Circuit, applying this Court's well-established Eleventh Amendment standards, found that EPCWID was not an arm of the State of Texas. This conclusion was indisputably correct under decisions of this Court and others treating several factors, including the entity's financial dependence on the state, as controlling. The Petition does not offer any basis for error or any suggestion of conflict. In fact, the theory advanced by the Petition – favoring a new single-factor test – is at

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[1] EPCWID filed a copy of this letter with the district court below.

odds with every decision of this Court on the subject and relies on the demonstrably erroneous assumption that Texas regards EPCWID as its alter ego. The Petition should be denied.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict

Notably, the Petition makes no attempt to even suggest that the Fifth Circuit's decision creates a conflict among the circuits. In fact, the Fifth Circuit's decision – requiring application of the six factors identified by this Court and others as controlling the arm-of-the-state inquiry – is in accord with decisions of every other circuit and, of course, decisions of this Court.[2] Likewise, the Fifth Circuit's decision denying arm-of-the-state status to

[2] In fact, notwithstanding EPCWID's argument in favor of a single factor test, every circuit with jurisdiction over the states has developed a multi-factor test similar to the Fifth Circuit's: *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 991 F.2d 935, 939 (1st Cir. 1993); *McGinty v. New York*, 251 F.3d 84, 95 (2d Cir. 2001); *Callahan v. City of Philadelphia*, 207 F.3d 668 (3d Cir. 2000); *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001); *Hall v. Medical College of Ohio*, 742 F.2d 299, 302 (6th Cir. 1984); *Strykowski v. Northeast Ill. Reg. Commuter R.R.*, No. 93-2724, 1994 WL 287395 (7th Cir. June 28, 1994); *Sherman v. Curators of Univ. of Mo.*, 16 F.3d 860, 865 n.6 (8th Cir. 1994); *Streit v. County of Los Angeles*, 236 F.3d 552, 566 (9th Cir. 2001); *Sturdevant v. Paulsen*, 218 F.3d 1160 (10th Cir. 2000); *Miccosukee Tribe v. Florida State Athletic Comm'n*, 226 F.3d 1226, 1231 (11th Cir. 2000).

a local water authority is in harmony with the only other circuit authority on the subject.[3]

While the Petition correctly notes that there was once disagreement *within* the Fifth Circuit about whether the factors could be jettisoned in favor of a so-called "bright-line" test that had been employed in an unpublished district court decision involving EPCWID, the panel in this case, consistent with practice in every other circuit, adhered to earlier precedent requiring consideration of all of the relevant factors and rejected this so-called "bright-line" test.

Obviously, this Court does not sit to resolve conflicts internal to a single circuit. This is the function of the *en banc* sitting of the circuits. The Fifth Circuit *en banc* considered EPCWID's arguments for creating a "bright-line" test and rejected them, leaving that circuit in harmony with every other circuit.

B. The Fifth Circuit's Decision Was Also Correct

1. Application of the Factors Employed by This Court and Others Confirms that EPCWID is not an Arm Of The State for Eleventh Amendment Purposes

No one disputes that some entities created by the state are so closely identified with it as to be regarded as

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[3] *Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984) (rejecting arm of state status to water authority); *see also, e.g., Kashani v. Purdue Univ.*, 813 F.2d 843 (7th Cir. 1987) (stressing that political subdivisions are not regarded as the state).

the state's alter ego. That said, this "Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions, such as counties and municipalities, even though such entities exercise a slice of state power." *Lake Country Estates, Inc. v. Tahoe Reg. Planning Agency*, 440 U.S. 391, 401 (1979). The question, then, is whether the entity "is more like a county or a city than it is like an arm of the state." *Mt. Health City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977). Judged against this standard, EPCWID is obviously not an arm of the state.

The Fifth Circuit, following this Court's guidance, established a six-factor test for determining whether an entity is an arm of the state for purposes of the Eleventh Amendment. *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986). These six factors inquire into: (1) whether the state statutes and case law view the agency as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. *Id.* at 744-45. This Court's recent decision in *Regents of University of California v. Doe*, 519 U.S. 425, 430-31 (1997), confirmed that the vulnerability of the state's purse is the most salient of these factors. This makes considerable sense in view of the Court's repeated recognition that the states' financial liability is "the Eleventh Amendment's core concern." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 53 (1994).

EPCWID has virtually no financial dependence on the state. It was undisputed below that EPCWID's funding is derived locally in the form of user fees, local taxes and bonds. TEX. WATER CODE ANN. §§ 51.302, 51.320, 51.339 and 51.448 (Vernon 1972). When a water improvement district dissolves, any remaining indebtedness is paid off by issuing more local bonds, which are to be retired by local taxes. *Id.* at § 51.803. If there is a surplus, the funds are paid *to the county treasurer*, not to the State. *Id.* at § 51.791. Likewise, if there is a deficiency after dissolution, the county is responsible for collecting the balance through another local tax. *Id.* at § 51.836. Indeed, during its deposition,[4] EPCWID conceded that it has never received funding from the state government, depo. trans. at 148, 214-15, and claimed to operate free from Texas governmental control. *Id.* at 19 ("we don't serve public needs").

As the Fifth Circuit noted in its opinion below, EPCWID made no effort to show its entitlement to immunity under the remaining five factors. The reason was clear: EPCWID was created as an indisputably autonomous local entity[5] that has the right to sue and be sued[6] and to hold property in its own name.[7]

In fact, while EPCWID would discard all of the other factors in favor of the first – whether state statutes and

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[4] The deposition transcript may be found as exhibit 14 to Southwestern Bell's Motion for Summary Judgment filed on April 14, 2000.

[5] TEXAS WATER CODE ANN. §§ 54.014-18 (Vernon 1972).

[6] *Id.* §§ 49.066; 51.185 (Vernon 2000).

[7] *Id.* § 49.219 (Vernon 2000).

case law treat it as an arm of the state – it plainly fails under that factor as well. Texas state courts treat water improvement districts as "political subdivision(s) of the state standing on the same footing as a county." *Sears v. Colorado River Mun. Water Dist.*, 487 S.W.2d 810, 812 (Tex. Civ. App. – Eastland 1972); *see also Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937 (Tex. 1993) (finding political subdivisions lacking statewide jurisdiction not to amount to the "state"). EPCWID would thus plainly fail the test set forth by this Court in the *Mt. Healthy* decision and elsewhere. *E.g., Lake County Estates*, 440 U.S. at 401.

2. EPCWID's "Stare Decisis" and "Bright-Line" Arguments Wither Under Scrutiny

EPCWID makes two related arguments against the panel decision in this case and in favor of its claimed status under state law. First, EPCWID complains that the Fifth Circuit rejected an earlier, one paragraph summary affirmance of an order approving immunity under a supposed "bright-line test." Second, EPCWID urges that the Fifth Circuit erred in not adopting the "bright-line test" it sponsored. In particular, EPCWID argues that this Court should now adopt a rule that would treat any political subdivision created under the Texas Constitution (or at least Article XVI, section 59) as an arm of the state, regardless of the entity's actual relationship to the state. Both of EPCWID's arguments are built on error – now corrected – that was wholly internal to the Fifth Circuit.

a. This Court has Never Even Remotely Suggested that the Relevant Factors, Including the State Treasury Factor, Could be Ignored

First, this Court and the lower federal courts, including the Fifth Circuit, have all identified a number of factors governing the arm-of-the-state analysis. The Fifth Circuit did not err in applying the relevant factors. The Fifth Circuit has long held that the six-factor test cannot be by-passed in favor of comparison between supposedly like entities. *E.g., Flores v. Cameron County,* 92 F.3d 258, 268 (5th Cir. 1996). Thus, the panel decision here adhered to the established rule.

But EPCWID's argument for a one-factor test is not only inconsistent with Fifth Circuit authority, it also is at odds with decisions of this Court. In recent decisions, this Court has made clear that the so-called "state treasury" factor, which inquires into the financial dependence of the entity on the state, is the most important of the factors that must be considered. *Regents of University of Cal. v. Doe,* 519 U.S. 425, 430-31 (1997) (citing *Hess v. Port Auth.,* 513 U.S. 30, 48 (1994) (suggesting that controlling significance is given to the so-called state treasury factor)). EPCWID's argument for a "bright-line" test eschewing all factors except the entity's status in the eyes of the state (a test it would fail anyway, infra), would totally erase the state treasury factor (and all others) and allow a state simply to confer Eleventh Amendment immunity on any autonomous local governmental entity by declaration, even though the entity has no financial or political relationship to the state.

b. EPCWID's Preference for the First Factor is Also Based on Erroneous Treatment of EPCWID's Status Under Texas Law

In any event, a "bright-line" test would not only be inconsistent with the core purpose of the Eleventh Amendment and all of the relevant law on the subject, it would also not benefit EPCWID in this case. Texas, as noted above, does not regard EPCWID as an arm of the state. *E.g.*, *Sears*, 487 S.W.2d at 812.

EPCWID's argument to the contrary is drawn entirely from (1) an unpublished decision of a district court, later affirmed in a per curiam decision that the Fifth Circuit has already found to be in error, and (2) dicta in a still earlier district court decision that did not involve the Eleventh Amendment question at all.

EPCWID first relies on an unpublished district court decision applying a "bright-line" rule under which it was concluded EPCWID would be an arm of the state. That decision, as the Fifth Circuit noted in its decision in this case, traces back to cases involving Texas Port Authorities and the question whether they are state entities entitled to common-law sovereign immunity. When one panel of the Fifth Circuit found a Texas Port Authority to be immune, another panel later found itself bound by that holding, noting that both Ports existed under the same Texas Constitutional provision, Article XVI, section 59. From this, the district court divined a "bright-line" test that would treat any of the thousands of Texas political subdivisions created under that section as automatically immune under the Eleventh Amendment, regardless of

their connection to the state.[8] While that district court decision was affirmed per curiam by a panel of the Fifth Circuit, it was contrary to earlier Fifth Circuit precedent, decisions of this Court and common sense. It was therefore properly rejected by the Fifth Circuit in this case below. And, the Fifth Circuit therefore properly refused to rehear the matter *en banc*.

EPCWID also relies on *part* of a 1955 federal district court decision suggesting that it is a "political subdivision" and "arm" of the state. *El Paso County Water Improvement Dist. No. 1. v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *modified*, 243 F.2d 927 (5th Cir. 1957). What EPCWID does not note is that this case did not raise or involve the Eleventh Amendment question at all. The district court there was addressing the entirely different question of title to a canal in the City of El Paso. Moreover, while EPCWID quotes this district court opinion at length, and highlights part of the case, it does not highlight the portion of the same discussion noting that EPCWID *"stand[s] upon the same footing as counties and other political subdivisions." Id.* (emphasis added).

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[8] As the Fifth Circuit noted in this case, the fact that an entity is a creature of the state or that it is entitled to sovereign immunity does not answer the question whether it is an alter ego of the state under the Eleventh Amendment. If it did, cities and counties, which are both creatures of the state (and often of state constitutions), would automatically be entitled to immunity as well.

CONCLUSION

When the appropriate standard is applied, it is clear that the district court and the Fifth Circuit were both correct in concluding that EPCWID is not entitled to immunity under the Eleventh Amendment. The Petition presents neither conflict nor any error. It should therefore be denied.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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Petitioner El Paso County Water Improvement District No. 1 ("the District") files this Reply to address new points raised in the Brief in Opposition of Respondent Southwestern Bell Telephone Company ("Southwestern Bell"). Southwestern Bell's brief contains significant errors and misrepresentations concerning the District's position.

I. Southwestern Bell's assertions in its Statement of the Case that the District has claimed immunity from federal and state law and that the District claims to be a private property owner are absurd and false.

Southwestern Bell's contention that the District claims to be immune from federal and state law is untrue and wholly unsupported by the record. The District has raised questions about the constitutionality and proper interpretation of Texas statutes upon which Southwestern Bell based its complaint in the district court. The District, as a governmental entity responsible to the State of Texas, the District's taxpayers, and the District's water users, is a creature of the laws of the State of Texas. The District understands that it, like every person, business entity, and governmental agency must comply with state and federal law.

Undeniably, under Article XVI, Section 59 of the Texas Constitution, the District is a governmental agency and, conversely, is not a "private property owner." By statute, TEXAS WATER CODE § 49.211(b), the District is authorized to purchase and own land. Tex. Water Code § 49.211(b) (Vernon 2000). While the District is a governmental agency that owns property for the benefit of the public, its rights-of-way for canals and drains generally are not open to public use. For obvious reasons, the public does not possess a right of free and unlimited access to District property, just as the public has no free access to state highway department storage and maintenance areas, state-owned prisons, and judges' chambers.

II. The Fifth Circuit's decision did not create a new conflict among the circuits but conflicts with its own previous decisions and illustrates the existing conflict among the circuits regarding the Eleventh Amendment immunity test, which conflict this Court should cure.

The District's Petition does not suggest that the Fifth Circuit's decision in this case creates a conflict among the circuits regarding the Eleventh Amendment immunity test because the conflict among the circuits has existed for some time. The Fifth Circuit's decision illustrates the conflict and departs from the usual and accepted course of judicial proceedings by ignoring *stare decisis*.

The District's Petition points out that the factors tests applied by the circuit courts of appeal vary significantly and range from two factors to nine. Justice O'Connor noted seven years ago that the circuit courts then were struggling to apply the Eleventh Amendment immunity test and that there was no uniformity. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 59 (1994) (O'Connor, J., dissenting). There is no truth to Southwestern Bell's assertion that the Fifth Circuit's decision in this matter is in accord with the decisions of all other circuits. There is no accord among the circuits. Southwestern Bell's Brief in Opposition, at note 2, recites a list of cases demonstrating this very point.

The Fifth Circuit has permitted one panel to overrule a decision of an earlier panel directly on point, completely ignoring *stare decisis*, and leaving in total disarray the issue of Eleventh Amendment immunity status for all districts created under Article 16, Section 59 of the Texas Constitution.

III. The District does not urge a single-factor test.

The District has never urged adoption of a single-factor test for Eleventh Amendment immunity; rather, the District submits that there is a threshold question to be answered, and the answer may obviate any need to apply a multi-factors test.

The threshold question essentially is: What is the state's intention as to the entity's arm-of-the-state status? In this case, Article XVI, Section 59 of the Texas Constitution answers that the State of Texas intended that districts created under this Article be considered arms of the state. In other words, the District interprets this Court's language in *Regents of University of California v. Doe*, 519 U.S. 425, 430 (1997), to mean that when state law clearly establishes a governmental agency as an arm of the state, then there is simply no need to apply a multi-factor test. *See* Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1309 (1992). The District agrees with Rogers' conclusion that only if the state's intention is unclear should the inquiry proceed.

IV. Only the law of Texas can supply the answer to whether the District is an arm of the State.

Southwestern Bell's citation to authorities outside the Fifth Circuit for the proposition that the District is not an arm of the State of Texas is irrelevant. ***One must look to the law of Texas*** to determine whether the District is an arm of the State of Texas for purposes of Eleventh Amendment immunity. Although the question whether a state agency is an arm of the state is a federal question, "that federal question can be answered only after considering the provisions of state law that define the agency's character." *Regents*, 519 U.S. 425, 430 n.5.

For example, in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court analyzed the question of whether an Ohio board of education, as a political subdivision of the State of Ohio, was entitled to Eleventh Amendment immunity by looking specifically to the law defining local school districts. "*Under Ohio law* the 'State' does not include 'political subdivisions' and 'political subdivisions' do not include school districts." *Mt. Healthy*, 429 U.S. at 280 (emphasis added). Consequently, Southwestern Bell's citations to First

Circuit and Seventh Circuit decisions relying on other law (not Texas law) for authority that the District is not an arm of the State of Texas are meaningless.

Southwestern Bell's citation to Texas appellate decisions that compare water districts to counties also is irrelevant to the issue before this Court. *See Sears v. Colorado River Mun. Water Dist.*, 487 S.W.2d 810 (Tex. Civ. App.–Eastland 1972, writ ref'd n.r.e.) (whether a water district is immune from tort liability and is more like a county performing governmental functions than a municipality performing proprietary functions); *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937 (Tex. 1993) (whether a municipal utility district is a "political subdivision" for purposes of executing mineral leases pursuant to Chapter 16 of the Water Code). Southwestern Bell selectively lifts language from these cases without reference to the context or issue and misuses authorities to support its proposition.

What is relevant to the issue before this Court, however, is that the Supreme Court of Texas and the Fifth Circuit have indicated that political subdivisions of Texas created under Article XVI, Section 59 of the Texas Constitution are arms of the state of Texas entitled to Eleventh Amendment immunity. *Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103 (5th Cir. 1995); *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 815 (Tex. 1993).

V. Texas Water Code Chapter 51 does not apply to any issue in this case.

The sections of Texas Water Code Chapter 51 cited by Southwestern Bell have nothing to do with the District. "Water improvement districts are governed by Chapter 55 of the [Texas] Water Code. . . . The purposes for which they may be formed are more narrow than municipal utility districts or water control and improvement districts." 36 DAVID B. BROOKS, TEXAS PRACTICE: COUNTY AND SPECIAL DISTRICT LAW § 46.79 (Matthew Bender & Co. ed., 1989); TEX. WATER CODE §§ 55.001 – 55.755

(Vernon Supp. 2001). Water control and improvement districts are governed by Chapter 51 of the Texas Water Code. DAVID B. BROOKS § 46.37; TEX. WATER CODE § 51.001 (Vernon Supp. 2001). Southwestern Bell erroneously cites Chapter 51 as applying to the District, which is a water improvement district. Southwestern Bell is simply wrong.

VI. The District does not rely solely on an unpublished district court decision and dicta.

Contrary to Southwestern Bell's mistaken insistence, the District relies on published opinions, *Ysleta Del Sur Pueblo v. El Paso County Water Improvement District No. 1*, 222 F.3d 208 (5th Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 177, 148 L. Ed. 2d 121 (2000) and *Pillsbury Co. v. Port of Corpus Christi Authority*, 66 F.3d 103 (5th Cir. 1995), among others, for claiming Eleventh Amendment immunity. These cases hold that districts created under Article XVI, Section 59 of the Texas Constitution are arms of the State of Texas and immune from suit in federal court. In *Ysleta*, the Fifth Circuit held specifically that the District is entitled to Eleventh Amendment immunity from suit in federal court.

CONCLUSION

This action presents this Court with the perfect opportunity to cure the conflict among the circuits over the tests used to analyze the nature of a governmental agency to determine whether it is entitled to Eleventh Amendment immunity. The Fifth Circuit's panel opinion on March 19, 2001, reversing its prior panel opinion on April 10, 2000 in *Ysleta*, which confirmed that the District was entitled to Eleventh Amendment immunity, highlights the confused state of affairs that exists among the circuit courts — and the Fifth Circuit — in their application of the test for Eleventh Amendment immunity. The District respectfully renews its Petition for Certiorari and prays that the Court will grant the Petition.

Respectfully submitted,

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